113 (3) 08-565

Supreme Court, U.S.
FILED
NOV 25 2008
OFFICE OF THE CLERK

Supreme Court of the United States

MICHAEL B. MUKASEY, in his capacity as Attorney General of the United States,

Petitioner,

—v.—

AMERICAN CIVIL LIBERTIES UNION; AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION; ADDAZI, INC., d/b/a CONDOMANIA; ELECTRONIC FRONTIER FOUNDATION; ELECTRONIC PRIVACY INFORMATION CENTER; FREE SPEECH MEDIA; PHILADELPHIA GAY NEWS; POWELL'S BOOKSTORES; SALON MEDIA GROUP, INC.; HEATHER CORINNA; NERVE.COM, INC.; AARON PECKHAM, d/b/a URBAN DICTIONARY LLC; PUBLIC COMMUNICATORS, INC.; SEXUAL HEALTH NETWORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Child Online Protection Act (COPA), which criminalizes a large amount of speech on the World Wide Web that adults are entitled to communicate and receive, violates the First Amendment to the U.S. Constitution.

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption. In addition to the parties listed in the caption the following plaintiffs are no longer parties to this proceeding: Androgyny Books, Inc., d/b/a A Different Light Bookstores; Planetout, Inc.; and Dan Savage. Their names were erroneously included on the Third Circuit caption.

CORPORATE DISCLOSURE STATEMENT

In accordance with FRAP 26.1 and LAR 26.1 Plaintiffs make the following disclosures:

The following plaintiffs do not have parent companies, nor do any publicly held companies own ten percent or more of their stock: American Civil Liberties Union, Aaron Peckham d/b/a Urban Dictionary, Public Communicators, Inc., Free Speech Media, Sexual Health Network, Salon Media Group, Inc., Powell's Bookstore, Philadelphia Gay News, Nerve.com Inc., Electronic Privacy Information Center, Electronic Frontier Foundation, Addazi, Inc., d/b/a Condomania, American Booksellers Foundation for Free Expression.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES v

RESPONDENTS' BRIEF IN OPPOSITION 1

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 6

REASONS FOR DENYING THE WRIT 7

I. THIS COURT HAS ALREADY RESOLVED THE LEGAL PRINCIPLES APPLICABLE TO THIS CASE. 7

II. THE DISTRICT COURT'S PROPER APPLICATION OF THE LEGAL PRINCIPLES PREVIOUSLY ANNOUNCED BY THIS COURT COMPELS THE CONCLUSION THAT COPA IS UNCONSTITUTIONAL. 11

III. THE LEGAL ISSUES RAISED BY THE GOVERNMENT ARE LARGELY IRRELEVANT TO THE CENTRAL UNCONSTITUTIONALITY OF THE STATUTE. 15

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

ACLU v. Ashcroft, 322 F.3d 240 (3rd Cir. 2003) 2

ACLU v. Gonzales, 478 F. Supp. 2d 775 (E.D.Pa. 2007) 3

ACLU v. Reno, 217 F.3d 162 (3rd Cir. 2000) 2

ACLU v. Reno, 31 F. Supp. 2d 473 (E.D. Pa. 1999) ... 2

Arkansas Writer's Project Inc. v. Ragland, 481 U.S. 221 (1987) 7

Ashcroft v. ACLU, 535 U.S. 564 (2002) 2, 17

Ashcroft v. ACLU, 542 U.S. 656 (2004) ..... *passim*

Bolger v. Youngs Drug Products, 463 U.S. 60 (1983) 8

Butler v. Michigan, 352 U.S. 380 (1957) 8

Central Hudson Gas & Electric Corp. v. PSC, 447 U.S. 557 (1980) 7

Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) 8

Ginsberg v. State of NY, 390 U.S. 629 (1968) 8

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) 7

Sable Communications v. FCC, 492 U.S. 115 (1989) 8

Simon and Schuster v. Members of NYS Crime Victims Board, 502 U.S. 105 (1991) 7

Turner Broadcasting Syst. v. FCC, 512 U.S. 622 (1994) 7

U.S. v. Playboy Entm't Group Inc.,
529 U.S. 803 (2000) 13

Statutes

Child Online Protection Act (COPA),
47 U.S.C. § 231 ..... *passim*

RESPONDENTS' BRIEF IN OPPOSITION

Pursuant to United States Supreme Court Rule 15, the respondents American Civil Liberties Union *et al.*, hereby submit this brief in opposition to the petition for a writ of certiorari.

STATEMENT OF THE CASE

The Child Online Protection Act (COPA), 47 U.S.C. § 231, makes it a crime to engage in certain non-obscene speech about sex on the World Wide Web. All parties agree that this speech is constitutionally protected for adults. The district court found, and the government does not dispute, that the statute criminalizes valuable speech, including speech by the plaintiffs. App. 119a-121a. According to the government's experts in this case, COPA could criminalize as many as 700 million Web pages. App. 77a.

The district court accurately summarized the statute. App. 57a-61a. COPA provides civil and criminal penalties for anyone who engages in speech that is "harmful to minors" on the Web if that speech is "available to any minor." 47 U.S.C. § 231 (a)(2), (3). "Harmful to minors" is defined as speech that is "patently offensive" to minors, "prurient" to minors, and lacks certain "value" for minors. 47 U.S.C. § 231(e)(6). The statute applies to any speaker on the Web who has the "objective of earning a profit." 47 U.S.C. § 231 (e)(2)(b). Speakers may not be held liable if they "in good faith, [h]ave restricted access by minors to material that is harmful to minors" by use of a credit card or personal identification screen

(or by other techniques that all parties agree are unavailable). 47 U.S.C. § 231(c)(1).

COPA was signed into law in late 1998. On February 1, 1999, following an evidentiary hearing, the district court preliminarily enjoined enforcement of COPA. *ACLU v. Reno*, 31 F. Supp. 2d 473 (E.D. Pa. 1999). The court of appeals affirmed the preliminary injunction on the single ground that COPA's reliance on "community standards" was likely to render the statute unconstitutional. *ACLU v. Reno*, 217 F.3d 162, 166 (3rd Cir. 2000). This Court reversed, holding that this flaw alone did not mean the statute was likely to be found unconstitutional. *Ashcroft v. ACLU*, 535 U.S. 564, 585 (2002). However, the Court left the preliminary injunction in effect and remanded for the court of appeals to consider any other issues concerning the constitutionality of statute. *Id.* at 585-86.

On remand, the court of appeals reaffirmed its conclusion that COPA was likely to be found unconstitutional, citing many flaws in the statute. *ACLU v. Ashcroft*, 322 F.3d 240 (3rd Cir. 2003); App. 150a-206a. This Court affirmed. *Ashcroft v. ACLU*, 542 U.S. 656 (2004). In doing so, the Court outlined the legal principles to be applied to the analysis of COPA. *Id.* at 665-67. Most notably, the Court held that "[b]locking and filtering software is an alternative that is less restrictive than COPA, and, in addition, likely more effective as a means of restricting children's access to materials harmful to them." *Id.* at 666-67. Because it was reviewing a preliminary injunction record that was several years old, the Court remanded the case to the district court

for a trial on the merits to determine if the evidence still supported its conclusion about COPA's unconstitutionality. *Id.* at 670-73.

The trial in the district court lasted more than four weeks. The district court heard the testimony of 38 witnesses, including twelve experts, and 172 exhibits were admitted. Once again, the district court ruled that the statute is unconstitutional. App. 55a-147a. In support of its conclusion, the district court made over 180 specific factual findings.

On the central issue identified by this Court – the effectiveness of the less restrictive alternative of filtering software – the district court made over 50 factual findings, each of which was fully supported by the evidence. App. 79a-96a. Specifically, the district court found that: (1) filtering software blocks "about 95 percent of sexually explicit material" and is "quite effective and accurate at blocking sexually explicit material, especially the most popular Web content," App. 92a, 96a; (2) according to defendants' own experts, one filtering software product (AOL) "blocked 98.7 percent of sexually explicit Web pages" and "of the filters tested, only two failed to block at least 90 percent of the sexually explicit Web pages and the vast majority blocked at least 95 percent of such pages," App. 94a-95a; and (3) two separate Congressionally commissioned reports found filters effective, App. 93a-94a. *See also ACLU v. Gonzales*, 478 F. Supp. 2d 775, 796 (E.D.Pa. 2007); *Ashcroft v. ACLU*, 542 U.S. at 668.

The district court further found that filters are far more effective in screening sexually explicit material than COPA's reliance on criminal law

enforcement. First, filters block overseas sites that cannot legally or practically be prosecuted in United States courts. App. 84a., 98a-100a, 124a-126a. Relying on "not dissimilar" statistics presented by experts for both parties, the district court found that "a substantial number (approximately 50 percent) of sexually explicit web-sites are foreign in origin" and that percentage is increasing. App. 77a-79a. Second, filters can be used to block access to "material that is distributed on the Web and on other widely used parts of the Internet" through computer protocols not covered by COPA. App. 82a, 98a. This includes such popular forms of Internet speech as peer-to-peer, email, instant messaging, and streaming video, none of which are covered by COPA. Third, filters block non-commercial sites that COPA does not reach. App. 59a.

The district court also made a number of other findings directly addressing the effectiveness of filters. As found by the district court, filters are "widely available and easy to obtain." App. 86a. Filters are "fairly easy to install, configure, and use and require only minimal effort by the end user." App. 87a. Filters can be customized to the needs and values of the parent as well as the age and maturity of the child. App. 80a. "It is difficult for children to circumvent filters." App. 92a. And, "85 percent of parents [who use AOL filters] are highly satisfied." App. 89a.

The district court's lengthy and thorough opinion did not limit itself to an analysis of filtering technology but analyzed every aspect of COPA, both factual and legal. The court found the statute

unconstitutional not only because filters represent a less restrictive and more effective alternative, but for other reasons as well. Summarizing its holding, the district court said:

> COPA facially violates the First and Fifth Amendment rights of the plaintiffs because: (1) COPA is not narrowly tailored to the compelling interest of Congress; (2) defendant has failed to meet his burden of showing that COPA is the least restrictive and most effective alternative in achieving the compelling interest; and (3) COPA is impermissibly vague and overbroad.

App. 146-47a.

The court of appeals affirmed, ruling that the district court had correctly identified and applied the relevant legal standards established by this Court in its remand order. App. 2a-52a. The Third Circuit's holding was based in large part on the district court's factual findings. The government did not challenge any of those findings, and none were found clearly erroneous by the court of appeals. See App. 41a.

In its petition, the government makes much of the court's application of the law-of-the-case doctrine. App. 9a-15a. The court of appeals did not, however, rely solely on that doctrine in finding COPA unconstitutional. As the court of appeals explained: "We reach our result both through the application of the law-of-the-case doctrine to our determination in *ACLU II* and on the basis of our independent analysis of COPA and would reach the same result on either basis standing alone." App. 52a. Perhaps

even more significantly, on the issue of filtering software, the court of appeals held "we would reach this conclusion on the basis of either the prior litigation *or* the district court's findings on the remand." App. 46a (emphasis added). Finally, the court of appeals recognized that it was not bound by the law-of-the-case doctrine if either the law or the facts had changed, or if to do so would perpetuate "clear error or manifest injustice." App. 11a. It concluded that none of those conditions applied.

SUMMARY OF THE ARGUMENT

This case has already been before this Court twice and the legal principles are well-established. The Court remanded for the purpose of obtaining updated facts. The district court made extensive findings, which the government does not challenge and only reinforce the findings from the preliminary injunction stage. After 10 years of litigation, the decision below broke no new ground. The courts below conducted the factual inquiry that this Court directed and then faithfully applied the legal standards that this Court articulated. There is simply no need for this Court, yet again, to explain the constitutional flaws of a statute that has been enjoined since its passage. There is nothing more to be decided in this case and the petition for certiorari should be denied.

REASONS FOR DENYING THE WRIT

I. THIS COURT HAS ALREADY RESOLVED THE LEGAL PRINCIPLES APPLICABLE TO THIS CASE.

This Court has already set out all of the law necessary to resolve this case, not only through holdings in similar cases but in its two prior opinions in this very case.

First, COPA is a content-based criminal prohibition on speech, and such restrictions are "presumed invalid" because they have the "constant potential to be a repressive force in the lives and thoughts of a free people." *Ashcroft v. ACLU*, 542 U.S. at 660. *See also R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992).

Second, a statute is not "narrowly tailored" if it is significantly overinclusive, *Simon and Schuster v. Members of NYS Crime Victims Board*, 502 U.S. 105, 121 (1991), or if it is significantly underinclusive, *Arkansas Writer's Project Inc. v. Ragland*, 481 U.S. 221, 232 (1987); *Central Hudson Gas & Electric Corp. v. PSC*, 447 U.S. 557, 564 (1980) (law "may not be sustained if it provides only ineffective or remote support for the government's purpose"); *Turner Broadcasting Syst. v. FCC*, 512 U.S. 622, 624 (1994) (defendant has burden of showing statute will in fact alleviate the alleged harms in a "direct and material way").

Third, because COPA "effectively suppresses a large amount of speech that adults have a

constitutional right to receive and to address to one another," it is "unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose the statute was enacted to serve." *Ashcroft v. ACLU*, 542 U.S. at 665. *See also Bolger v. Youngs Drug Products*, 463 U.S. 60, 74 (1983) ("The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox"); *Sable Communications v. FCC*, 492 U.S. 115 (1989); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Butler v. Michigan*, 352 U.S. 380 (1957). *Cf. Ginsberg v. State of NY*, 390 U.S. 629, 634-35 (1968) (upholding restriction on direct sale to minors because it "does not bar the appellant from stocking the magazines and selling them" to adults).

Fourth, "the burden is on the Government to prove that the proposed alternatives will not be as effective as the challenged statute." *Ashcroft v. ACLU*, 542 U.S. at 665. In measuring the effectiveness of alternatives,

> [t]he test does not begin with the status quo of existing regulations, then ask whether the challenged restriction has some additional ability to achieve Congress' legitimate interest. Any restriction on speech could be justified under that analysis. Instead, the court should ask whether the challenged regulation is the least restrictive means among available, effective alternatives.

Id. at 666.

Applying these well-settled principles to its review of the preliminary injunction, this Court concluded that "[f]ilters are less restrictive than COPA." *Id.* at 667.

> [Filters] impose selective restrictions on speech at the receiving end, not universal restrictions at the source. Under a filtering regime, adults without children may gain access to speech they have a right to see without having to identify themselves or provide their credit card information. Even adults with children may obtain access to the same speech on the same terms simply by turning off the filter on their home computers. Above all, promoting the use of filters does not condemn as criminal any category of speech, and so the potential chilling effect is eliminated, or at least much diminished.

Id.

This Court also recognized that filters "may well be more effective than COPA." *Id.* As this Court explained, "COPA does not prevent minors from having access to . . . foreign harmful materials," whereas "a filter can prevent minors from seeing all pornography, not just pornography posted to the Web from America." *Id.* In addition, this Court noted that the "[e]ffectiveness" of COPA's criminal prohibitions "is likely to diminish even further if COPA is upheld, because the providers of the materials that would be covered by the statute simply can move their operations overseas." *Id.* Finally, this Court observed that filters, unlike

COPA, "can be applied to all forms of Internet communication, including e-mail, not just communications available via the World Wide Web." *Id.* at 668.

This Court's reference to the factual record was understandably tentative because the Court was reviewing a preliminary injunction and was concerned that the record then before it might "not reflect current technological reality" due to the passage of time. *Id.* at 671.

There was nothing tentative, however, about this Court's discussion of narrow tailoring or the legal principles on which it is based. In seeking review from this Court for a third time, the government attempts to manufacture a legal issue by contending that ". . . the relevant comparison is between COPA and measures to encourage the use of filters," not between COPA and filters as an "effective alternative." Petition at 27-28. This Court's prior holding rejects the government's argument. *Ashcroft v. ACLU*, 542 U.S. at 668-69. In any event, the government appears to concede that it had the burden of establishing that "measures to encourage the use of filters" were not "effective alternatives." Petition at 27-28. The government made no attempt to meet that burden. Despite that failure, its complaint that the lower courts ignored the subject (Petition at 28) is incorrect (App. 44a).[1]

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[1] It is worth noting that the government spent $1 million dollars on a study designed to meet the question defined by this Court, which the government now claims to be the wrong question: whether or not filters are effective.

In short, this case currently presents no new issues of law for the Court to resolve. Accordingly, there is no reason for this Court to grant the petition.

II. THE DISTRICT COURT'S PROPER APPLICATION OF THE LEGAL PRINCIPLES PREVIOUSLY ANNOUNCED BY THIS COURT COMPEL THE CONCLUSION THAT COPA IS UNCONSTITUTIONAL.

This Court remanded this case for the district court to make up-to-the-date findings about the relative effectiveness of COPA and filters. *Ashcroft v. ACLU*, 542 U.S. at 670-73. The district court did so extensively. The district court found that approximately 50 percent of all "sexually explicit" speech originates overseas, that COPA does not cover speech from overseas and that, even if it did, COPA's criminal provisions could not be enforced against such speech as a practical matter.[2] App. 77a-78a, 124a-127a. The district court also found that COPA does not reach many Internet applications such as peer-to-peer, email, instant messaging, and streaming video. App. 98a. And, by definition, COPA does not reach non-commercial speech. 47 U.S.C. § 231 (e)(2)(b). The evidence was clear that

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[2] The government argues that in the most technical sense it can attempt to enforce the statute overseas. The argument is unpersuasive for the reasons stated by the district court and has been rejected by this Court. App. 124a-127a; *Ashcroft v. ACLU*, 542 U.S. at 667. However, whether or not the legal assertion is correct, the government appears to concede that practical considerations will prevent enforcement against speech originating overseas. Petition at 30.

sexually explicit speech occurs in all of these forms. App. 124a-27a.

By contrast, the district court found that filters would reach all of these forms of speech, and would reach overseas as well as domestic sites. App. 82a, 84a. Significantly, the district court cited the government's own study in finding that filters are approximately 95% effective, and are most effective in blocking the most popular web pages that are accessed through commonly used search terms. App. 94a-95a.

The government does not dispute these facts, which establish even more firmly facts that this Court already deemed sufficient to affirm the preliminary injunction. *Ashcroft v. ACLU*, 542 U.S. at 657. Instead, the government places almost exclusive reliance on its assertion that only 50 percent of parents use filters.[3] The government's argument is unpersuasive on multiple grounds. First, even assuming the accuracy of the government's statistic, it does not belie the fact that filters are more effective than a criminal statute that does not reach oversees sites, non-commercial sites, or non-web based speech. Second, the number of parents using filters has increased by 65% within the past four years. Tr. 10/24/06, at 88-90 (Cranor). Third, parents choose not to use filters for many reasons. Studies introduced at trial reveal that the

[3] The government also argues that filters overblock and that this overblocking will discourage parents from using filters. The government fails to inform the Court that the district court expressly found its evidence on overblocking unreliable. App. 95a-96a.

number one reason why parents do not use filters is they trust their children and do not see a need to block any content. Tr, 10/24/06, at 90-91, 133-34 (Cranor); Tr. 10/31/06, at 219 (Whittle); PX 85, at 0049. One study, which allowed multiple responses, found that 60 percent of parents do not use filters because they trust their children, 53 percent do not use filters because they check up on their children's activities in other ways, and 40 percent do not use filters because the computer is in a public place in the home. Pl. Exh. 85, at 0049. Fourth, and most fundamentally, the government's argument rests on the unstated assumption that it has a compelling interest in overriding the decisions of parents. This Court has already effectively rejected that argument. *U.S. v. Playboy Entm't Group Inc.*, 529 U.S. 803, 824 (2000); *Ashcroft v. ACLU*, 542 U.S. at 670 ("COPA presumes that parents lack the ability, not the will, to monitor what their children see.").

As both lower courts found, COPA is undeniably less effective than filters. Even judged in the absence of filters, COPA does nothing to advance the government's asserted interest. The government's claim to the contrary rests on the assertion than half a loaf is better than nothing. The government argues that COPA serves a worthwhile purpose even if 50% of all sexually explicit web sites are hosted overseas and thus beyond COPA's reach. Whatever merits that argument may have in other contexts, it makes no sense here and rests on a fundamental misunderstanding of how the Internet functions.

Content on the Internet is typically accessed through a search engine, such as Google. A Google search for the United States Supreme Court produces over 8 million "hits." Reducing this number by half is unlikely to have any impact on the amount of information available about the Supreme Court or the ease of obtaining it (especially if the reduction is based on the location of the host site rather than an analysis of the site's content). This is even more true for the sexually explicit speech that COPA addresses. Without COPA, according to the government, someone seeking sexually explicit speech on the Internet has access to a Google list of 700,000,000 pages, which is a mixture of domestic and foreign. App. 77a. If COPA works perfectly, someone seeking sexually explicit speech on the Internet will still have access to a Google list of 350,000,000 pages, all of them foreign. The fact that these pages are generated overseas rather than in the United States is unlikely to make any difference to the person doing the search. The search does not take any longer, access to a web page is equally simple, the volume of speech is still obviously more than one person can absorb, and there is no reason to assume that there is any meaningful difference between the sexually explicit content available on foreign sites and domestic sites.

Whatever the effect may be on domestic sites versus sites originating overseas, moreover, COPA will have no effect on such wildly popular forms of Internet speech as video, email, and peer-to-peer communications. A minor seeking sexually explicit speech on the Internet is unlikely even to notice the

difference between a world in which COPA applies and one where it does not. That will most emphatically not be true of a minor whose parents have installed a filter.

Although COPA will be demonstrably ineffective in advancing the government's interest, the unique and constitutionally protected speech that plaintiffs offer on the Internet will by severely diminished if not entirely eliminated by COPA's threat of criminal prosecution. For example, the district court found, and the government does not dispute, that Salon and Nerve, popular online magazines with standing to challenge COPA, may have to self-censor to avoid prosecution. App. 120a-21a. Thus, COPA produces a clear First Amendment injury with no corresponding benefit for the goals that COPA is ostensibly meant to achieve.

Given this Court's prior rulings and the record compiled on remand, the conclusion that COPA is unconstitutional is inescapable and does not merit a third round of review by this Court.

III. THE LEGAL ISSUES RAISED BY THE GOVERNMENT ARE LARGELY IRRELEVANT TO THE CENTRAL UNCONSTITUTIONALITY OF THE STATUTE.

In an effort to find a legal issue that merits review by this Court, the government argues that the lower courts misinterpreted or failed to credit the significance of four provisions of COPA. The careful examination of each of these provisions by the lower courts persuasively demonstrates that their

interpretations were correct. More importantly for purposes of this petition, each of the asserted errors are irrelevant, as this Court has already held, to the overwhelming evidence that filters are less restrictive and more effective than COPA. *Ashcroft v. ACLU*, 542 U.S. at 667-68.

First, the government asserts that the lower courts misinterpreted the term "commercial purposes" in COPA. Petition at 21. Emphasizing that the statute's definition of "commercial purposes" includes a provision that the posting of harmful to minors material be part of "a regular course" of business, the government urges that the statute be interpreted to mean that no criminal charges could be brought if the speech was "occasional or sporadic." Petition at 21; 47 U.S.C. § 231(e)(2)(b). Setting aside the obvious vagueness of the government's proposed new gloss on the statute, the lower courts carefully considered the government's argument and correctly rejected it. App. 176a-79a; 138a-39a, 19a-20a. More importantly, even assuming *arguendo* that the government's interpretation might slightly limit the number of web pages subject to COPA, it does not alter the fact that COPA is more destructive and less effective than filters for the universe of speech still covered by the statute.

Second, the government argues that the lower courts misinterpreted the definition of "minors," which the statute defines as "any person under 17 years of age." 47 U.S.C. § 231 (e)(7). According to the government, this unmodified statutory language should be interpreted to include only "older minors." Petition at 23. However, the government expressly

refused to further define "older minors" and refused to interpret it to mean 16 year olds. Petition at 22-24. Once again the government's gloss raises vagueness problems. After careful consideration of the government's argument and its attendant vagueness problems, the lower courts have consistently rejected it and correctly interpreted the term "minor" to include "an infant, a five-year old, or a person just shy of age seventeen." App. 18a, 48a, 50a, 139a-40a, 171a-75a, 139a-40a. And, once again, the government's proposed re-definition of the term "minors," even if accepted, would do no more than somewhat limit the number of web pages covered by COPA. For those pages that are covered, the statute would still be more restrictive and less effective than filters.

Third, the government argues that the lower courts misinterpreted and undervalued the "as a whole" language that is found in the prurience and value prongs (but not the patently offensive prong) of COPA's definition of "material that is harmful to minors." 47 U.S.C. § 231 (e)(6); Petition at 31. This Court has already noted the difficulty of applying the term "as a whole" to the World Wide Web. *Ashcroft v. ACLU*, 535 U.S. at 592-93. The government offers no supplemental interpretation except to recite the previously failed argument that the term requires material to be viewed in "context." Petition at 31. At trial, the government judged whether material was harmful to minors or not based solely on an individual web page. Tr. 111/7/06, at 206-07 (Mewett). The lower courts carefully analyzed this statutory provision and correctly interpreted and

applied it. App. 169a-71a, 141a-42a, 49a-50a. Depending on what "context" means, the government's proposed interpretation might decrease or even increase the number of web pages subject to criminal and civil prosecution under COPA. Regardless of the effect, with respect to the pages that are covered, the statute would still be more restrictive and less effective than filters.

Perhaps the government is arguing that if all three of these interpretations were adopted, COPA would cover so few pages that its constitutional deficiencies would be some form of harmless error. It is hard to credit such an argument when the government has now conceded that the statute reaches the valuable speech of at least some of the plaintiffs, and the government's own evidence at trial claimed that up to 700 million web pages were sexually explicit and thereby covered by COPA.[3] But, if the central question on this petition is whether a statute is constitutional if it criminalizes constitutionally protected speech when there are less restrictive, more effective means of achieving the government's purpose, then the statute is unconstitutional whether the speaker goes to jail for posting 700 million pages or just one.

Finally, the government emphasizes the statutory defenses. A web speaker may avoid

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[3] The government's $1 million study was designed to identify "sexually explicit" pages, not pages that are "harmful to minors." Because the government introduced it for the purpose of evaluating the effectiveness of filters as opposed to COPA, the government implicitly conceded that it viewed the terms as synonymous.

prosecution by making the speech unavailable to anyone who does not enter a credit card number (or adult access code) into the web page. 47 U.S.C. § 231(c)(1). The district court took a great deal of testimony on the availability and utility of the defenses and made over 50 specific findings of fact, none of which the government argues are clearly erroneous. App. 101a-18a. The court of appeals affirmed. App. 179a-85a. The government does not dispute that adults will be deprived of constitutionally protected speech as a result of the defenses. App. 12a, 110a-18a, 127a-28a. Moreover, the government concedes that the defenses are so flawed that they will not prevent minors from having access to material covered by COPA and then surprisingly argues that the failing is irrelevant. Petition at 24-26. The government's view renders COPA even less effective and does not diminish the established effectiveness of filters.

In short, the government's attempt to re-write the statute is wrong, but, even if correct, would not alter the inescapable constitutional deficiencies of COPA. For the same reasons that these legal questions did not prevent this Court from affirming the preliminary injunction, there is no reason for this Court to grant the government's petition to address legal questions that cannot transform COPA into a constitutional statute, no matter how they are resolved. This Court does not issue advisory opinions. In the end, an advisory opinion is all that the government is seeking.

CONCLUSION

For all the reasons stated above, Respondents' respectfully request that this Court deny the petition for review.

Respectfully Submitted,

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